

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MICHAEL STEVE COX,

Petitioner,

v.

STATE OF NEVADA, et al.,

Respondents.

Case No. 3:13-cv-00053-MMD-VPC

ORDER

This habeas matter comes before the Court on petitioner's application to proceed *in forma pauperis* (dkt. no. 1) and for initial review under Rule 4 of the Rules Governing Section 2254 Cases. The Court finds that petitioner is unable to reasonably promptly pay the \$5.00 filing fee and therefore will grant the pauper application.

Turning to initial review, it appears that the petition is subject to dismissal without prejudice because none of the claims therein have been exhausted in the state courts through to the Supreme Court of Nevada. Petitioner therefore will be directed to show cause why the petition should not be dismissed without prejudice for lack of exhaustion.

I. BACKGROUND

Petitioner Michael Steve Cox does not challenge his underlying conviction in this action. He instead challenges a forfeiture of good time sentencing credit following upon orders by a small claims court and a state district court finding him to be a vexatious litigant. Petitioner has not attached a copy of a state supreme court decision deciding

1 the claims presented in the federal petition. He alleges that he is unable to do so due to
2 inadequate funds and alleged difficulties in obtaining copies from the prison law library.

3 Petitioner identifies only one proceeding in the Supreme Court of Nevada, under
4 No. 61444. However, the online docket records of that court reflect that the state
5 supreme court dismissed that appeal for lack of jurisdiction, without deciding any issue
6 on the merits, because petitioner had not appealed an appealable order. The order
7 noted that no statute or court rule authorized an appeal from an order declaring a litigant
8 to be a vexatious litigant unless he complied with a court order. The Court was unable
9 to locate on the docket of the Supreme Court of Nevada where the claims in the federal
10 petition otherwise were exhausted in the state supreme court in a proceeding
11 challenging the forfeiture of good time credit.

12 **II. GOVERNING LAW**

13 The Court may raise issues of exhaustion *sua sponte*. See, e.g., *Aiken v.*
14 *Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). Under 28 U.S.C. § 2254(b)(1)(A), a habeas
15 petitioner first must exhaust his state court remedies on a claim before presenting that
16 claim to the federal courts. To satisfy this exhaustion requirement, the claim must have
17 been fairly presented to the state courts completely through to the highest court
18 available, in this case the Supreme Court of Nevada. E.g., *Peterson v. Lampert*, 319
19 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir.
20 2003). In the state courts, the petitioner must refer to the specific federal constitutional
21 guarantee and must also state the facts that entitle the petitioner to relief on the federal
22 constitutional claim. E.g., *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That
23 is, fair presentation requires that the petitioner present the state courts with both the
24 operative facts and the federal legal theory upon which his claim is based. E.g., *Castillo*
25 *v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement ensures
26 that the state courts, as a matter of federal-state comity, will have the first opportunity to
27 pass upon and correct alleged violations of federal constitutional guarantees. See, e.g.,
28 *Coleman v. Thompson*, 501 U.S. 722, 731(1991).

1 A petition that is completely unexhausted is subject to immediate dismissal. See,
2 e.g., *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Jiminez v. Rice*, 276 F.3d
3 478, 481 (9th Cir.2001).

4 **III. DISCUSSION**

5 Petitioner has not exhausted any claims in the Supreme Court of Nevada. The
6 appeal in No. 61444 in that court did not exhaust any claims. See *Castille v. Peoples*,
7 489 U.S. 346, 351 (1989) (presenting a claim in a procedural context in which the merits
8 of the claim will not be considered, or will be considered only in special circumstances,
9 does not constitute fair presentation of the claim).

10 Petitioner therefore must show cause in writing why the petition should not be
11 dismissed as completely unexhausted. The petition will be dismissed without further
12 advance notice if petitioner does not timely respond to this order or fails to demonstrate
13 that the action should not be dismissed without prejudice for lack of exhaustion. Nothing
14 herein signifies either that the claims in the federal petition correspond to any particular
15 claim in the state court proceedings or that the petition otherwise is free of deficiencies.
16 Petitioner at all times remains responsible for calculating the running of the applicable
17 state and federal limitations periods, for timely seeking appropriate relief in the state and
18 federal courts, and for first exhausting state judicial remedies on his federal claims.

19 **IV. CONCLUSION**

20 IT IS THEREFORE ORDERED that petitioner's application to proceed *in forma*
21 *pauperis* (dkt. no. 1) is GRANTED to the extent that petitioner shall not be required to
22 pay the \$5.00 filing fee.


23 IT IS FURTHER ORDERED that the Clerk of Court shall file the petition and
24 accompanying motions.

25 IT IS FURTHER ORDERED that, within thirty (30) days of entry of this order,
26 petitioner shall SHOW CAUSE in writing why the petition should not be dismissed
27 without prejudice for lack of exhaustion. Petitioner shall identify by docket number and
28 date all state supreme court proceedings upon which he bases a claim of exhaustion.

1 Petitioner further shall attach¹ with his response copies of all state court filings and
2 decisions upon which he relies to establish that the exhaustion requirement has been
3 satisfied as to the claims in the federal petition.

4 A request for an extension of time to respond will be considered only in the most
5 extraordinary of circumstances. If petitioner submits an unfounded dilatory extension
6 request instead of a response, the action will be dismissed without further advance
7 notice.

8 DATED THIS 13th day of August 2013.

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11 MIRANDA M. DU
12 UNITED STATES DISTRICT JUDGE
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25 _____
26 ¹While the Court has found that petitioner is unable to promptly pay the filing fee,
27 the financial documents submitted with the pauper application belie petitioner's claim
28 that he is unable to pay for legal copies. Petitioner has sufficient incoming deposits to
pay for copies, although he perhaps may have to defer some discretionary store
purchases. The Court is not persuaded that there is a generalized problem at Ely State
Prison regarding loss of documents submitted for copying.